RECENT CASES.

CONSTITUTIONAL LAW.

Sovereignty of State Conducting Private Business

The mere fact that it has engaged in the private enterprise of dispensing alcoholic liquors does not so far divest a State of its sovereignty as to render it liable to suit by a private individual. *Murray* v. *Wilson Distilling Co.*, 29 Supreme Court, 458.

(For a full discussion see note p. 37 of this issue.)

CONTEMPT OF COURT.

Duty of Sheriff to Prisoner

During the pendency of an appeal in a criminal case to the United States Supreme Court, it is contempt of that Court for the Sheriff in charge of the prisoner to fail to do all in his power to protect the prisoner from the mob. *United States* v. *Shipp, et al.*, 29 Supreme Court, 637.

(For a full discussion see note p. 35 of this issue.)

DAMAGES.

Road Law: Land Damages: Change of Grade

In *Jamison* v. *Cumberland County*, 39 Pa. Superior, 335, the Court held that the Act of June 8, 1907, P. L. 505, repealed the Act of May 1, 1905, P. L. 318, in so far as it related to damages for a change of grade, and dismissed a petition for the appointment of jurors to assess damages.

(For a full discussion see note p. 39 of this issue.)

EQUITY.

Recovery of Money Lost in Gambling

That the concurrent jurisdiction of courts of equity and of law extends to the case of the recovery of money lost in gambling, is the decision of the Supreme Court of Appeals of West Virginia in *Berns* v. *Shaw,* 64 Southeastern, 930. The defendant contended that the bill, which was for recovery of money lost at roulette, was demurrable, inasmuch as there was no necessity for discovery, and plaintiff had, therefore, a plain, adequate and complete remedy at law.

But the Court, following the decision on the same subject in *McKinney* v. *Pope's Administrators,* 3 B. Monroe (Ky.), 93 (1842), held that the remedy in this case was concurrent, not only under statutory authority, but also on the principles of public policy, which would lead to the conclusion that both branches of the court should be open to a plaintiff seeking recovery of money obtained from him by fraud.

The exact principle upon which this doctrine is based is somewhat difficult to fathom, since there seems to be a clear remedy at law, unless it rests upon the general rule that equity has concurrent jurisdiction with courts of law to grant relief in all cases from consequences of fraud. *Macey Co.* v. *Macey,* 143 Mich. 138 (1906).

EVIDENCE.

Presumption of Death After Seven Years

Referring to the subject of the presumption of death, the trial Judge charged that "the death of the party is presumed by the law when he has been absent seven years without being heard from—absents himself. The absence means from the locality where such party has lived before, and is away from, and not being heard from means not heard from in the locality which had been his home and where he had lived." *Held,* error. *Hansen* v. *Owens,* 64 S. E. R. 800 (Ga.).

The presumption of death after seven years' absence has been a doctrine of the common law, universally recognized for many years, and applies to all persons alike, except children of a tender age. *Manley* v. *Pattison,* 73 Miss. 417, or persons over one hundred years old—*Young* v. *Shulenberg,* 165 N. Y. 385. The lower Court in the present case, however, stated the proposition much too broadly and ignored certain pre-requisites of the presumption. It is not enough that a person "has not been heard from in the locality which had been his home;" it must also appear that he has not been heard from by those

EVIDENCE (Continued).

who would be most apt to hear. *Doe* v. *Andrews,* 15 Q. B. 756. Mere absence is not sufficient, as the Supreme Court observed, and no presumption will arise where it appears that one has moved to another place.

Circumstantial Evidence Weight and Sufficiency

In establishing the *corpus delicti,* the State has to accomplish two tasks of very different degrees of difficulty. To prove that a man is dead—even that he has been killed—is, as a rule, a comparatively simple thing; the finding of a corpse is the usual opening of a murder case. But to prove with any degree of certainty that the accused was the responsible party is, on the other hand, a very difficult thing. A murder is seldom witnessed; the criminal is naturally cautious of detection, and consequently the State is forced to rely largely upon either the testimony of a single accidental witness; or, as in many cases, to rely solely upon the chain of facts which points strongly to one man or another, in order to fasten the guilt upon the proper person.

The Courts have been conservative as to the weight to be accorded to circumstantial evidence, as a dangerous weapon in the hands of twelve untutored men. But some Judges have been inclined to carry this conservatism to the point of prejudice, and have instructed their juries in a fashion that speaks rather of cowardice than of conscience, insisting that to justify the inference of guilt from circumstantial evidence, the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Thus, if every uncontroverted fact pointed one man out as a murderer, and a motive, moreover, was shown, still he must go scot-free if some isolated circumstance might be found upon which to build another hypothesis. Two of the older text-writers have embodied this idea in their treatises—Wills in his "Circumstantial Evidence (p. 149), and Starkie "Evidence" (p. 838). But the view would be impossible in practice, since it would demand mathematical certainty in every case, practically negativing any convictions.

All this is a super-sublimated state of the moral justice of the Anglo-Saxon, and consequently the vast majority of Courts and cases have been against it. Now and then, however, it crops up—an instance appearing in a recent Wisconsin case. A laborer had been found dead from a gunshot. Blood had

EVIDENCE (Continued).

been traced to the window of a nearby house, the screen of that window exhibiting a bullet-tear. Inside, a gun with one of the barrels discharged tallied in calibre with the death-dealing cartridge, and there was additional evidence of ill feeling on the part of the householder toward the victim. On the strength of these facts he was arrested, tried, and convicted, the evidence being entirely circumstantial and the jury being instructed to convict "if the evidence established the material evidentiary circumstances beyond a reasonable doubt." *Spick* v. *State,* 121 N. W. Rep. 665.

An appeal was immediately taken on the ground that circumstantial evidence, to be efficient, must establish guilt with some appreciably higher degree of certainty than direct evidence, and there being indications that some other than the accused *might* have been responsible, the jury were not justified in their conviction. The Supreme Court quite properly refused the prayer, holding circumstantial evidence to be on a par with direct evidence. This is the view of the great weight of authority. *Re Thorne,* 6 L. R. 49; *Schwante's Case,* 127 Wis. 60; *Whar. Cr. Ev.,* 9 Ed., p. 10; *Wigmore Ev.,* p. 26, etc.

Blackstone divides presumptions into the violent, the probable, and the weak. Bl. Com. 371. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak. The deciding factor in these cases is really the question of motive. *State* v. *Lane,* 64 Mo. 319. No matter how suspicious the accumulated facts might be, conviction would be impossible, or at least improbable, so long as no ostensible reason for the act might be shown—though motive in itself is not a necessary element of proof. Taking this into consideration, it is hard to see how circumstantial evidence can be an instrument of injustice, and many jurists have openly preferred it to the other variety. "Circumstantial evidence," says Chief Justice Gibson in *Com.* v. *Harmon,* 4 Pa. 269, "is in the abstract nearly, though perhaps not altogether as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as a fact which is the necessary consequence of a chain of facts sworn to by many witnesses of undoubted credibility."

INTERSTATE COMMERCE.

The Point at Which Inter-State Commerce Ends

The defendant was convicted of transporting liquors within a city without having first obtained a permit as required by statute. It appeared that the liquors were shipped from another State, consigned in care of defendants, "consignees," underneath which appeared the names of the nineteen persons to whom the liquors were to be distributed. The defendant contended that until the goods reached these nineteen purchasers, they were still in interstate transportation; therefore the law could not apply to such transportation without being unconstitutional. *Held,* there was evidence from which a jury might find that the defendant was engaged in interstate commerce, and the lower Court had, therefore, erred in instructing the jury that no question of interstate commerce was involved. *Commonwealth* v. *Peoples Express Co.,* 88 N. E. R. 420 (Mass.).

It was contended by the Commonwealth that the defendant was merely the agent of the consignees, and this theory was favored by the Court; but it was held that it was not, in reason, impossible to find that the defendant was the concluding link of the interstate transportation, hence the question was for the jury. It has been held in the case of *Cory* v. *Eureka Springs R. Co.,* 7 I. C. Rep. 286, that wagon and team traffic could never come within the clauses of the Interstate Commerce Act, but this case was not adverted to, and the Court was here dealing with a somewhat different proposition from the interpretation of that act. The case illustrates the niceties of determining when interstate commerce ends. The Wilson Act says "upon arrival" in the State.—U. S. Comp. St. 1901, p. 3177. This has been held to mean not mere presence at the boundary line, but delivery to the consignee.—*Rhodes* v. *Iowa,* 170 U. S. 412. Under the "original package" doctrine, which necessitated the Wilson Act, the Courts had gone so far as to allow an importer to resell within the State, if the original package had not been broken. *Leisy* v. *Hardin,* 135 U. S. 100. At the present time the phrase "on arrival" must be interpreted to fit each case as it arises; delivery at a siding has been held to be no arrival. *State* v. *Intoxicating Liquors,* 94 Me. 335; and the only general rule which has been forthcoming is that the transportation ends upon arrival at destination and delivery to consignee, which only postpones the difficulty, and leaves "destination" and "consignee" to be fought out in every case such as the present.

LIBEL AND SLANDER.

Extent of the Injury to Make it Actionable

The United States Supreme Court, in passing upon the question of the extent of the injury of a libel in order to make it actionable, in *Peck* v. *Tribune Co.*, 29 Supreme Court Rep. 554, held that if the publication would hurt the plaintiff in the estimation of an important and respectable part of the community, it is actionable.

(For a full discussion of the facts and principles see note p. 45 of this issue.)

NEGLIGENCE.

Liability of City for Injury Resulting From Unauthorized Act.

City Councils authorized the use of certain streets for a carnival, having no authority to do so. Booths were erected by private individuals, in descending from one of which plaintiff was injured. *Held,* she can recover from the city. *Van Cleef* v. *Chicago,* 88 Northeastern, 815.

(For a full discussion see note p. 42 of this issue.)

NEGOTIABLE INSTRUMENTS.

Pension Checks: Forged Indorsements

In the case of *United States* v. *National Exchange Bank of Providence,* 29 Supreme Court Reporter, 665, the Supreme Court passed upon the right of the United States to recover money paid to a bank upon a forged pension check. A large number of pension vouchers were presented to the pension agent at Boston, upon receipt of which he drew checks on the Subtreasury in favor of the persons named in the vouchers, and transmitted the checks directly to them. They were presented to the bank and paid, and they were later met by the Subtreasury when forwarded for collection. Some time later it was discovered that all, or nearly all of them were drawn in the names of parties who were either deceased or no longer entitled to a pension. The United States, therefore, sued the banks to recover back the amounts paid, and the Supreme Court, speaking through Mr. Justice White, upheld its right to recover.

NEGOTIABLE INSTRUMENTS (Continued).

The opinion outlines the method adopted by the Pension Office to ascertain and check the identity of pensioners, consisting as it does of duplicate pension vouchers, the signature on which must correspond with the indorsement on the check, and then goes on to show that the taking of such precautions by the Government should not be held to raise a presumption of law that the signatures are valid, to be relied upon by third parties. The bank which pays to the one presenting the check is placed upon inquiry as to its genuineness just as much as in the ordinary case of negotiable instruments.

The same question had previously been passed upon by the District Court for the Northern District of New York in *United States* v. *Onondaga County Savings Bank,* 39 Federal, 259 (1889), and substantially the same conclusion reached.

TRUSTS.

Enforcement Jurisdiction

X, president of the A Corporation of New Jersey, advanced $40,000 to others in settlement of their claims against the corporation, and acquired from them 500,000 shares of the corporation's capital stock. X died in Pennsylvania and the B bank in that State became his executor. A claimed ownership of the stock subject only to the tender of the $40,000 advanced, and filed a bill in chancery therefor in New Jersey. B demurred to the jurisdiction. The Court in deciding for the plaintiff corporation declared that equity had jurisdiction to establish a trust in shares of stock of a New Jersey corporation, though the trustee resided out of the State and could not be served with process, but could only be brought in by statutory proceedings against absent defendants. *Amparo Mining Co.* v. *Fidelity Trust Co.,* 73 Atl. Rep. 249.

The fundamental doctrine of equity as originally administered was that its remedies and decrees operated *in personam* upon defendants, and not *in rem* upon the subject-matter. Thus, if a negligent trustee was within reach, a decree in chancery would be effective, regardless of the *situs* of the trust *res. Kildare* v. *Eustace,* 1 Vern. 405; but if the situation were reversed, and merely the *res* were within the jurisdiction, equity would be powerless.—*Spurr* v. *Scovill,* 3 Cush. 578. This lack has been remedied in most States by statute, so that at present a decree will act *quasi in rem* against a foreign trustee where

TRUSTS (Continued.)

the *res* is within the State.—Ames, Cases on Trusts, p. 249; though the distinction between the statutory and the inherent powers of a Court of Equity has not always been recognized. See *White* v. *White,* 53 Md. 564; *Curtis* v. *Smith,* 60 Barb. 9.

Of course, if both *res* and trustee are out of the jurisdiction, any decree of the Court would be *brutem fulmen.* In the case of shares of stock, where the company is within the State in which the action is brought, and the certificate in the hands of one who is sought to be made a trustee and who lives in the foreign jurisdiction, in such case it is often a nice question as to just what is the *situs* of the *res.* Stock-shares have much in common with choses in action, and choses in action are held to be situate at the place where they can be most effectively dealt with—that is, where the debtor or other person against whom the claim exists resides.—Dicey, Conflict of Laws, 318-20, 1st Am. Ed. But, on the other hand, since a complete and effectual transfer of stock can only be had on the books of the company, it is held that shares of stock, for purposes other than taxation and similar purposes, are personal property, whose location is in the State where the corporation is located. Cook, Corp., 520. Foreign possession of the certificates, therefore, would be of no moment,—they would be only evidence of ownership of the shares, and the interest represented by those shares would be held by the company for the benefit of the true owner. As the habitation or domicile of the company is, and must be, in the State that created it, the property represented by the certificate may be deemed to be held by the company within the State whose creature it is, whenever it is sought to determine who is the real owner. *Jellenick* v. *Huron Copper Mining Co.,* 177 U. S. 1.

Under the facts of the present case, therefore, the A Corporation would be the equitable owner of the stock in the State in which it sued, the B bank becoming the trustee with possession of the mere evidences of title. No personal act would be necessary in such case to vest title in the corporation, the situation being different from a bill to remove a cloud on title in real estate, where the statute must of necessity give the decree the effect of a conveyance. A determination that the stock belongs to the complainant becomes effective at once, and the complainant may or may not issue new certificates therefor. All the decree need do to effectuate the title is to decree that the certificates in the hands of the defendant are null and void.

VENDOR AND PURCHASER.

Recording of Deeds: Notice

A lent B a sum of money, taking as security a mortgage of the latter's farm. The agreement included the proviso that the said mortgage should become void upon the tender of the money. A recorded the instrument of transfer which was in the form of a warranty deed, though in fact a mortgage. Some years later the money was returned to the creditor, who accordingly deeded back the property.

B went into possession of the farm, and later leased it to tenants, but never recorded the transfer in his own name. Subsequently the land was attached by A's creditors, was sold by the sheriff, and bought by a stranger on the faith of the record; and B, the actual owner, at once sued to clear his title.

It was decreed that a grantee in possession has title against all the world, whether his deed is recorded or not; consequently, the purchaser buying entirely upon the strength of the record was left to a dubious remedy against those from whom he ostensibly bought. *Brady* v. *Sloman,* 120 N. W. 795.

The facts of this case are unusually interesting as a test of the recording system. The use and value of the system lies in the fact that one who looks carefully into the record is protected even against a real owner, provided there is nothing to put him on notice as to another's claim. Thus, in the present case, had there been nothing more than the recorded deeds, the plaintiff would have lost his case. The case depends, as do most cases where record is involved, upon the question of notice. Notice may be actual or constructive, the former explaining itself, the latter proceeding from extraneous facts which should put an ordinarily diligent man on inquiry. Tiffany, Prop., pp. 476-9; Pomeroy, Equity, pp. 597, 604. Pomeroy distinguishes four kinds of constructive notice, the most important being that arising from possession of the disputed territory. Where the claimant is actually in possession of the land bought, it is everywhere settled that the purchaser is put on notice. *Noyes* v. *Hall,* 7 Otto, 34, 38; *Webber* v. *Taylor,* 2 Jones Eq. 9.

In the present case whatever possession confronted the purchaser was that of the claimant's tenants—a rather slender fact on which to build up a case of constructive notice. The Court held this sufficient, however, to warn a prospective purchaser, and thereby followed the larger number of American cases which impose the duty of inquiry as to the tenant's rights. *Pomeroy* Eq. Jur., p. 618; *Cunningham* v. *Pattee,* 99 Mass. 248. It seems an unfortunate view, imposing as it does so minute a

VENDOR AND PURCHASER (Continued).

task upon every purchaser, and interfering with the real aim of the recording acts; so that the minority view, which follows the English decisions on the subject, (*Jones* v. *Smith,* 1 Hare, 43, 63,) seems at first sight at least to be more just. Certainly, the careless party in the present case was he who failed to record his deed.

WATERS AND WATERCOURSES.

Riparian Rights Conflicting With Right of Appropriation

The plaintiff, a riparian owner along the San Pedro River in Arizona, sought to enjoin the defendant, a non-riparian owner, from appropriating water by means of a dam and ditch through plaintiff's property. In answer to the plaintiff's contentions the Court held that, though the plaintiff had secured his grant from the Mexican Government before the cession of Arizona to the United States, yet even at that time the doctrine of appropriation was in force; also that the subsequent patent from the United States merely confirmed the Mexican title; and though the English Common Law had been adopted by the Arizona Code, yet this did not include the doctrine of riparian rights, in view of the Bill of Rights and other sections of the Code. *Boquilla Co.* v. *Curtis,* 29 Superior Court, 493.

The doctrine of appropriation in relation to watercourses is in conflict with all common law theory, and owes its origin to the peculiar natural conditions existing in some of the Western States and Canada. According to this doctrine, the extent of an appropriator's right is measured by the extent of his original appropriation. *Atchison* v. *Peterson,* 20 Wall. 514; and priority in time determines priority of right among several appropriators. *Egan* v. *Estrada,* 56 Pac. 721. It is also well settled that an appropriator need not be a riparian owner. *Krall* v. *U. S.,* 79 Fed. 241; *Smith* v. *Deniff,* 24 Mont. 20; but may divert the water by dams and ditches. *Nevada Water Co.* v. *Powell,* 34 Cal. 109. Therefore, the plaintiff endeavored to establish that the English Common Law was in force by virtue of the Arizona Code; but the doctrine of appropriation had already been recognized in Arizona in the case of *Hill* v. *Lenormand,* 2 Ariz. 354, and the Court decided that it had existed even under the Mexican Government. And the United States patent could not help the plaintiff, since a patent on the "footing of an earlier grant by a former sovereign does not intend or purport to enlarge the grant."